

Division of Aging and Adult Services Administrative Letter No. 04-12
Adult Services Section

To: County Directors of Social Services

Date: September 21, 2004

Attention: Adult Services Supervisors

**Subject: Recent Changes to North Carolina General Statute 35A and
Implications for Guardianship and Adult Protective Services
Practice**

**Distribution: County Directors of Social Services,
Adult Services Supervisors**

I. Background

The purpose of this letter is to clarify changes to North Carolina General Statute 35A that were approved during the 2004 Session of the General Assembly, and to discuss implications of these changes for Guardianship Services and Adult Protective Services (APS). These changes were ratified in House Bill 281 (Technical Corrections Act) and are found in Part II, Section 31.(a)(b)(c) of this Bill. A copy of Section 31.(a)(b)(c) is attached for your convenience.

Two of the changes relate to the clerk's authority to appoint nonresident guardians of the estate and nonresident general guardians; and the removal of nonresident guardians by the clerk when these guardians fail to comply with the jurisdiction of the North Carolina courts. The third change relates to the emergency removal of a guardian without a hearing when the clerk finds reasonable cause to believe an emergency exists that threatens the physical well-being of the ward, or constitutes a risk of substantial injury to the ward's estate, and the clerk's ability to enter interlocutory (temporary) orders. These changes are effective immediately, and are described below.

II. Authority to Appoint Nonresident Guardians

North Carolina General Statute 35A-1213(b), Qualifications of Guardians, has been rewritten to read:

“(b) A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointments must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence.

The clerk shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties."

Practice/Implementation:

This change authorizes a clerk of court to appoint a nonresident of the State of North Carolina to serve as guardian of the estate, or general guardian. The nonresident guardian of the estate or general guardian must appoint a resident agent (the intermediary between the clerk of court and the nonresident guardian) to accept service of process for the guardian in all matters relating to the guardianship. The clerk is required to have a nonresident guardian of the estate and general guardian post a bond. The clerk has the discretion to require a nonresident guardian of the person to post a bond.

Previously, a clerk of court had the authority to appoint a nonresident of the State of North Carolina to serve as a guardian of the person only. The nonresident guardian of the person was required to appoint a resident agent to accept service of process. The resident agent is not required to post a bond.

Consultation with an associate counsel at the Administrative Office of the Courts about the resident agent's duties confirms the duties are very limited in scope. The duties are limited to forwarding pleadings (notifying the nonresident guardian of all citations, notices and processes served on the resident agent) as outlined on form AOC-E-500, Appointment of Resident Process Agent. (A copy of AOC-E-500 is attached) The resident agent's duties do not involve monitoring the nonresident guardian to ensure the court maintains contact; or quarterly visits with the ward to ensure the ward's needs are being met; or assuming any powers and duties outlined in Article 8, Powers and Duties of Guardian of the Person, or in Article 9, Powers and Duties of Guardian of the Estate.

When providing guardianship services to individuals who are alleged to be incompetent adults and to their families, and the assessment reveals the most appropriate proposed guardian resides out of state; assist the proposed guardian in identifying others (i.e., friends, neighbors, or family members who may not be willing or able to serve as guardian but want to remain involved) to serve as resident agent. If locating others to serve as resident agent is a barrier to the clerk appointing a nonresident guardian, you may consider volunteering to serve as resident agent to facilitate the appointment. It is very important to talk with your clerk to fully understand the resident agent's duties, and the clerk's expectations of the resident agent. Should you decide to volunteer to serve as a resident agent, you may request the clerk to outline the resident agent's duties in the clerk's order and the nonresident guardian's letters of appointment.

III. Removal by the Clerk

NC G. S. 35A-1290(c) has been rewritten to read:

“(c) It is the clerk’s duty to remove a guardian or to take other action sufficient to protect the ward’s interest in the following cases:

- (1) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence.**
- (2) The guardian has been convicted of a felony under the laws of the United States or of any state or territory of the United States or of the District of Columbia and his citizenship has not been restored.**
- (3) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment as guardian due to a change in residence, a change in the charter of a corporate guardian, or any other reason.**
- (4) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes.**
- (5) The guardian fails to post, renew, or increase a bond as required by law or by order of the court.**
- (6) The guardian refuses or fails without justification to obey any citation, notice, or process served on him in regard to the guardianship.**
- (7) The guardian fails to file required accountings with the clerk.**
- (8) The clerk finds the guardian unsuitable to continue serving as guardian for any reason.**
- (9) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian’s process agent.”**

(NOTE: Items #1 – #8 above are not changed, and are highlighted for ease of reading.)

Practice/Implementation:

North Carolina General Statute 35A-1290(c) now provides authority to the clerk to remove a nonresident guardian (#9). The change in the statute authorizes the clerk to remove a nonresident guardian when the nonresident guardian fails or refuses to obey any citations, notices, or service of process served on the nonresident guardian or the guardian’s process (resident) agent by the court.

Please note that in G. S. 35A-1290(c)(9) “process agent” is used, while in G. S. 35A-1213(b) “resident agent” is used. A process agent and a resident agent are synonymous, and are used interchangeably in G. S. 35A.

Historically clerks of court have been reluctant to appoint nonresidents to serve as guardians of the person for wards residing in North Carolina. A major reason for this reluctance is clerks lack jurisdictional authority in other states. For example, if a nonresident guardian fails to comply with the laws of North Carolina, issuing show cause or contempt orders are not options clerks can use to force compliance because other states are not legally obligated to comply with the North Carolina Probate Court. Now that clerks have the authority to remove nonresident guardians they may be more willing to consider recommendations to appoint nonresident guardians since jurisdictional authority will not be an issue.

IV. Emergency Removal; Interlocutory Orders on Revocation

North Carolina General Statute 35A-1291 has been rewritten to read:

“The clerk may remove a guardian without a hearing if the clerk finds reasonable cause to believe an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward’s estate. In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward’s estate or the other party seeking relief by such revocation.”

Practice/Implementation:

This change authorizes a clerk of court to remove a guardian without a hearing in the event of an emergency that threatens the ward’s physical well-being, or when the ward’s estate is at substantial risk; and to enter an order or decree to protect the ward or the ward’s estate. The ability to remove a guardian without a hearing and issue an interlocutory order expedites the clerk’s ability to protect the ward until a successor guardian can be appointed. The clerk’s authority to enter temporary orders in these emergency situations may be a useful option in providing Adult Protective Services in specific situations. In fact, when financial matters are involved, the clerk’s order would be preferable since an APS order does not authorize management of finances. Since the clerk has jurisdiction in the matter, and knowledge of the ward’s situation, a clerk’s order may avoid the need to petition district court to obtain an ex parte emergency APS order.

Between the time the clerk removes the guardian and the hearing to appoint a successor guardian, the interlocutory order authorizes DSS to provide protective services. There is no timeframe specified for the appointment of a successor guardian, so the same criteria (service on the ward, guardian ad item and other parties of record) that apply to the initial appointment of a guardian also apply in these situations.

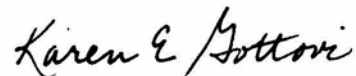
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For example, in the course of an APS evaluation, it is determined that a general guardian fails to file required accountings with the clerk, obtains the ward's assets for her own use and fails to arrange for needed in home services. As a result of this mismanagement, the ward loses his home, has no assets, and has lost weight. Upon hearing the APS information, the clerk must be satisfied that a true emergency exists to justify revoking the Letters of Appointment, removing the guardian without a hearing and issuing a temporary order. The order gives DSS authority to do whatever is necessary to address the emergency, such as, locate housing, arrange for in home services for the ward and protect the ward's estate until a successor guardian is appointed.

As with all changes, collaboration with your clerk of court is key to guardianship services provision for older and disabled adults and their families in your respective communities. Questions about APS or Guardianship may be directed to your Adult Programs Representative, or Rosalyn Pettyford, Guardianship Program Consultant, or Laura Cockman, APS Consultant, in the Central Office at 919-733-3818.

Sincerely,

A handwritten signature in black ink that reads "Karen E. Gottovi". The signature is written in a cursive, flowing style.

Karen E. Gottovi, Director

KEG/rp
Attachments

SECTION 31.(a) G.S. 35A-1213(b) reads as rewritten:

~~"(b)An individual appointed as general guardian or guardian of the estate must be a resident of the State of North Carolina.~~ A nonresident of the State of North Carolina, to be appointed as general guardian, guardian of the ~~person~~ person, or guardian of the estate of a North Carolina resident, must indicate in writing his willingness to submit to the jurisdiction of the North Carolina courts in matters relating to the guardianship and must appoint a resident agent to accept service of process for the guardian in all actions or proceedings with respect to the guardianship. Such appointment must be approved by and filed with the clerk, and any agent so appointed must notify the clerk of any change in the agent's address or legal residence. The clerk ~~may~~ shall require a nonresident guardian of the estate or a nonresident general guardian to post a bond or other security for the faithful performance of the guardian's duties. The clerk may require a nonresident guardian of the person to post a bond or other security for the faithful performance of the guardian's duties."

SECTION 31.(b) G.S. 35A-1290(c) reads as rewritten:

~~"(c)It is the clerk's duty to remove a guardian guardian or to take other action~~ sufficient to protect the ward's interests in the following cases:

- (1) The guardian has been adjudged incompetent by a court of competent jurisdiction and has not been restored to competence.
- (2) The guardian has been convicted of a felony under the laws of the United States or of any state or territory of the United States or of the District of Columbia and his citizenship has not been restored.
- (3) The guardian was originally unqualified for appointment and continues to be unqualified, or the guardian would no longer qualify for appointment as guardian due to a change in residence, a change in the charter of a corporate guardian, or any other reason.
- (4) The guardian is the ward's spouse and has lost his rights as provided by Chapter 31A of the General Statutes.
- (5) The guardian fails to post, renew, or increase a bond as required by law or by order of the court.
- (6) The guardian refuses or fails without justification to obey any citation, notice, or process served on him in regard to the guardianship.
- (7) The guardian fails to file required accountings with the clerk.
- (8) The clerk finds the guardian unsuitable to continue serving as guardian for any reason.
- (9) The guardian is a nonresident of the State and refuses or fails to obey any citation, notice, or process served on the guardian or the guardian's process agent."

SECTION 31.(c) G.S. 35A-1291 reads as rewritten:
"§ 35A-1291. ~~Interlocutory Emergency~~
removal; interlocutory orders on revocation.

The clerk may remove a guardian without hearing if the clerk finds reasonable cause to believe that an emergency exists that threatens the physical well-being of the ward or constitutes a risk of substantial injury to the ward's estate.
In all cases where the letters of a guardian are revoked, the clerk may, pending the resolution of any controversy in respect to such removal, make such interlocutory orders and decrees as the clerk finds necessary for the protection of the ward or the ward's estate or the other party seeking relief by such revocation."

STATE OF NORTH CAROLINA

File No.

In The General Court Of Justice
Superior Court Division
Before The Clerk

IN THE MATTER OF THE ESTATE OF:

Name Of Decedent/Incompetent

APPOINTMENT OF RESIDENT PROCESS AGENT

G.S. 28A-4-2(4); 35A-1213(b)

I, the qualified personal representative or guardian of the above named estate, appoint the process agent named below on whom may be served citations, notices and processes in all actions or proceedings with respect to this estate.

Name And Address Of Resident Process Agent

Date

Signature Of Personal Representative Or Guardian

Telephone

County Of Residence

Name Of Personal Representative Or Guardian (Type Or Print)

ACCEPTANCE OF APPOINTMENT

I accept this appointment as resident process agent for the above named personal representative or guardian, and agree to notify the personal representative or guardian of all citations, notices and processes served on me as his resident process agent.

SWORN AND SUBSCRIBED TO BEFORE ME

Date

Date

Signature Of Resident Process Agent

Signature Of Person Authorized To Administer Oaths

Name Of Resident Process Agent (Type Or Print)

☐ Deputy CSC ☐ Assistant CSC ☐ Clerk Of Superior Court

SEAL ☐ Notary

Date My Commission Expires